Clift

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

VERN GAMBRIELL, Appellant, v. MASON COUNTY AND STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, Respondents.	SHB No. 91-26 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on for hearing on January 10, 1992 in Shelton, Washington, Mason County, before the Shorelines Hearings Board, Annette McGee, presiding, with Board members Judith Bendor, Nancy Burnett, and Dave Wolfenbarger in attendence, and with John H. Buckwalter, Administrative Law Judge, as legal adviser. Chairman Harold S. Zimmerman was unable to attend but has reviewed the tapes, exhibits, and other pertinent documents.

At issue was Mason County's denial of Mr. Gambriell's request for a variance permit, Mason County No. 90-52, for the addition of a dining room to his existing structure.

Appearances were:

Alexander W. Mackie, Attorney at Law, for appellant.

Michael Clift, Mason County Deputy Prosecutor, for respondent Mason County.

Proceedings were recorded by Kim L. Otis of Gene Barker Associates and were also taped. The site was visited by the Board, witnesses were sworn and testified, exhibits were examined, and arguments of counsel were considered. Written closing briefs were filed January, 17, 1992. From these, the Board makes these

FINDINGS OF FACT

I

The site of the matter under consideration is in an area known as Murphy Brook Point on the south shore of the Hood Canal. At this point the Hood Canal runs generally west to east. Murphy Brook Point is a small but high density residential community lying in a narrow space between the Canal and Highway 106 which runs generally parallel to the Canal and is landward from the houses. The area is designated as Urban environment by the Mason County Master Shoreline Plan (MCMSP). Many of the residences either overhang the water or are at or near bulkheads, and most of them exceed the 60% maximum limit for impermeable surfaces which is set by MCSMP, Chapter 7.16.080, p. 53.

II

In 1986 Mr. Gambriell purchased two adjacent lots, 9 and 10, in the Murphy Brook Point development. A residence which was built in 1956 is on lot 9, the westerly lot. Lot 10 is easterly and is vacant. The front of the residence faces the water. Access is from from the rear on the roadward side. Approximately three-quarters of the house is landward of a bulkhead and the other quarter is on

pilings waterward of the bulkhead. The ground floor of the house measures approximately 616 square feet and includes a kitchen, bath room, living room, and a deck along the front but no dining room designated as such. There is also a deck on the east side of the house which is totally landward of the bulkhead. This deck's surface was permeable, allowing water to enter the soil through gaps in the wooden floor.

III

In May 1987 appellant applied to the Mason County Department of General Services for a building permit to perform certain internal remodeling in the existing residence and also to add externally a 13' by 16' enclosed dining room to be located entirely over the existing deck of the same size on the east side of the house. The plans were approved and the building permit was issued on June 8, 1987 with no requirement for a Shorelines variance permit. The permit carried a notice:

> *This permit becomes null and void if work or construction authorized is not commenced within 180 days, or if construction or work is suspended or abandoned for a period of 180 days at any time after work is commenced.*

IV

Appellant started construction in 1987 and completed the interior remodeling. The exact or even approximate date of completion cannot be determined from the evidence presented, but no work had been done on the exterior dining room during this period. In 1989 Appellant

applied for shoreline and building permits for a pier and dock to be built to the east of the house and side deck. The permits were granted on March 8, 1989, and appellant completed the work sometime before May 17, 1990. On that date Mr. Gambriell submitted an application for a building permit to construct the added dining room which he had not completed before, but this permit was not issued by the Department of General Services because it was determined by the Department that a shorelines variance permit was required by the MCSMP which had been revised March 1, 1988. Appellant, without the building permit having been issued, poured the dining room concrete floor and erected some of the framework. Replacing the slatted wooden floor with concrete increased the impermeable lot coverage.

V

By letter dated July 3, 1990, the Mason County Department of General Services notified appellant that a Stop Work Order had been posted on his property because his 1987 building permit had expired. The letter also informed him that he would have to get both a new building permit and a shorelines variance permit because his house was a nonconforming development, the expansion of which is prohibited by the SMP. The second reason given for the requirement for a variance permit was that the resulting site coverage by impervious surfaces would exceed the allowable 60% of the total area.

VI

Appellant immediately ceased work and on December 20, 1990 submitted an Application for Shoreline Variance 90-52. The application asked for a variance to build a 16' by 13' enclosed dining room with a concrete foundation over the already existing deck to the east of the house. Measurements by the Department of General Services indicated that addition of the dining room would increase the proportion of impermeable surface on lot 9 to 65%.

VII

On January 2, 1990, the Department of General Services issued an Environmental Impact Determination of Nonsignificance for the project. After posting and publication of required notices, analysis and with recommendations by staff and the Mason County Shorelines Advisory Committee, the Mason County Commissioners in public meeting unanimously denied the variance request. The appellant was so notified by letter dated March 18, 1991 from the Department of General Services. Appellant's request for review was filed with the Board on April 18, 1991 and was certified by the Department of Ecology by letter dated April 29, 1991.

VIII

The Board heard testimony that a number of houses in the immediate vicinity of appellant's residence have dining rooms, and in the absence of any rebuttal testimony, we so state as a Finding of Fact.

We also state in the absence of rebuttal testimony that appellant's only dining area at present is his small kitchen and bar area and that, because appellant's drain field lies back of the house, the deck area is the only space available for the addition of a dining room to the present structure.

IX

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact the Board makes these

CONCLUSIONS OF LAW

I

This Board has jurisdiction over the parties and subject matter of this action. RCW 90.58.180. Appellant has the burden of proof.

II

The PRE-HEARING ORDER issued June 14, 1991, defined the issues as:

1. Is the addition of a 13'x16' dining room over an existing deck consistent with the Mason County Shoreline Master Program and Washington State Shoreline Management Act?

2. If a variance is required, is a variance warranted under the facts of this case?

There are three questions to be resolved by the Board in reaching its decision:

III

The first is:

<u>IS A VARIANCE PERMIT REQUIRED BECAUSE THE DINING ROOM IS AN ADDITION TO A NONCONFORMING STRUCTURE?</u>

Both MCSMP 7.04, GENERAL PROVISIONS, page 9, and section 7.13.020, Applicability to Nonconforming Developments, define a nonconforming development as:

> *...a shoreline use or structure which was lawfully constructed or established prior to the effective date of the Act or the Master Program, or amendments thereto, but which does not conform to present regulations or standards of the Program or policies of the Act.*

The Gambriell residence is a "nonconforming structure" as defined above because a portion of it overhangs the water in violation of MCSMP POLICY, section 1, page 47, but it was built in 1956 before enactment of the Shorelines Act in 1971. Therefore, it "may continue to be utilized for the same purpose established on the date of the statute." MCSMP 7.13.020.

IV

7.13.020 further provides on page 20 that "Expansion of a nonconforming development is prohibited." (subsequently referred to herein as the "first" paragraph). That paragraph is immediately followed by another paragraph (subsequently referred to herein as the "second" paragraph):

> *Nonconforming development may be continued provided that it is not enlarged, intensified or increased or altered in any way which increases its nonconformity: PROVIDED significant environmental damage does not result. Expansion of a development which is nonconforming by reason of substandard lot dimensions, setback requirements or lot area, but which is not a nonconforming use may be allowed as a Variance.*

V

In applying the last five lines of the above paragraph to the proposed project, the Board concludes that the issuance of the DNS by the County on January 2, 1990 disposes of the proviso that significant environmental damage may result from this project alone. The Board also concludes that the expansion is not nonconforming due to substandard lot dimension or lot area, and that the setback consideration is disposed of by respondent County's Exhibit R-9, Board of Mason County Commissioners' Proceedings, March 12, 1991, page 2:

> *Chairman Hunter asked if the proper setbacks would be maintained if the proposal were constructed. Mr. Orr (of the Department of General Services) responded that they would be.*

VI

The remaining factor to be considered is the first sentence of the "second" paragraph of 7.13.020 quoted above: "Nonconforming development may be continued provided that it is not enlarged, intensified or increased or altered in any way which increases its nonconformity." We must consider the relationship between this sentence and the "first" paragraph of 7.13.020 quoted in Conclusion of Law III above since both relate to the permissibility of an addition to a nonconforming structure.

VII

We note first that if, under the "second" paragraph, <u>any</u>

enlargment to a nonconforming structure would per se increase its nonconformity, both cited paragraphs would have the same effect: any increase in the size of a nonconforming development would require a variance permit. This would make the second paragraph superfluous. We must apply the rules of statutory construction and read these two requirements together so that a regulatory scheme evolves which maintains the integrity of both requirements. (State v. O'Neill, 103 W.2d 853, (1985)). In doing so we find that the first paragraph is a general requirement which is modified by the more specific second paragraph and that the second more specific requirement must prevail in this matter. (Estate of Little, 106 Wn.2d 269, (1986))

VIII

In interpreting the provision in the second paragraph that an enlargement to a nonconforming structure may not increase its nonconformity, we must first define the word "nonconformity". Since no definition of nonconformity appears in any of the controlling documents, 90.58 RCW, 173.14 WAC, or the MCSMP, we will give the word its plain and ordinary meaning. (Estate of Little, supra, at 283) We find that a noncomformity is an action or act of not conforming to the law. See Webster's Third New International Dictionary. We conclude that the nonconformity under consideration is the act of building a structure over the water of the Canal. In building his proposed dining room landward behind the bulkhead, we conclude the appellant

will not enlarge that act.

We note further that, if the County intended the second paragraph to control any enlargement of the structure itself, it very well could have used words such as "in any way which increases the size of the structure." The fact that it did not do so is a further indication that such a meaning was not intended since the second paragraph would then, in effect, be duplicative of the first, which prohibits any expansion.

IX

In its written Closing Argument on page 4, the County argues that "because appellant has located his residence over the water," making it a nonconforming use, the addition of a dining room increases the nonconformity of the use "because it facilitates increased use of the residence by extended family." (We note that the appellant did not locate his residence over the water. That was done in 1956 by a prior owner.)

The word "use" is not defined in 90.58 RCW, 173 WAC, and the MCMSP, but in those documents it consistently designates the type of construction, development, or manner of use of the land which is to be permitted or denied, not the amount of usage nor the number of people who may subsequently enjoy the "use". (See, for instance, MCMSP use requirements for Water Dependent Use, Water Oriented Use, and Water Related Use on page 13). More particularly, the nonconformance in

appellant's residence is the violation of MCSMP USE REGULATIONS, par. 1. on page 48: "Residential development over the water is prohibited". Any increased use by appellant of the overhanging portion of his residence will not increase the size or extent of the original "development over the water" which occurred in 1956.

X

We conclude that the construction of a dining room over the already existing deck which does not overhang the water will not increase the nonconformity of the structure and that no variance permit is required under MCSMP 7.13.020.

The County argues that the above interpretation makes unnecessary the provisions in Section 7.13.020 for the normal maintenance and repair of nonconforming developments. The Board cannot agree. Maintenance, repair, expansion, or increase are different kinds of activities with differing requirements (such as time limitations) imposed by their respective MCSMP paragraphs.

XI

The second question to be resolved is:

IS A VARIANCE REQUIRED BECAUSE THE ADDITION OF THE DINING ROOM WILL RAISE THE IMPERMEABLE SURFACES ABOVE THE 60% LEVEL ALLOWED BY THE MCSMP?

The MCSMP requires that for a single family residence the impermeable portion of the total lot area in an Urban environment

shall not exceed 60% of the total area of the lot. MCSMP page 53.

XII

The County argues that a variance is required because the County's measurements show that the addition of the dining room would increase the impermeable area of the lot to 65% of its total. The appellant argues that the County's measurements are incorrect, that the level would not increase any existing impermeability nonconformity, and, therefore, no variance should be required.

XIII

Although there is a certain lack of clarity as to how the County's measurements were made, particularly with respect to the area covered by a wood shed which extends to some undefined length on the west and south sides of the residence, the Board finds that appellant has not met his burden of proof to show that the County's measurements are incorrect. Accordingly, the Board concludes that the dining room would increase the proportion of impermeable surfaces and that a variance permit is required. The Board also concludes that lots 9 and 10 are separate entities and that measurements made by either party to determine the percentage of the area of impermeability are to be based on lot 9 area only.

XIV

In the hearing on January 10, 1992, appellant stipulated that he is willing to remove a portion of his wood shed to meet the applicable

impermeable surface limit. Accordingly, the Board concludes that, if appellant satisfies his stipulation by reducing the total impermeable surfaces to the same proportion which existed without the dining room, no variance permit will be required.

XV

If appellant is not able to reduce the impermeable area to the previous level or less as noted above, the amount of impermeability nonconformity will be increased over that which existed before the dining room construction and a variance permit will be required. The following determinations will then apply.

XVI

The third question to be resolved is:

CAN APPELLANT SATISFY ALL OF THE CRITERIA OF MCSMP CHAPTER 7.28.020, VARIANCES?

A variance permit may be authorized only if the application meets all of the six criteria required by MCSMP 7.28.020.

XVII

The fifth paragraph of the six criteria in 7.28.020 requires that the public interest must suffer no substantial detrimental effect.

In another paragraph, the MCSMP states that "consideration shall be given to the cumulative impact of additional requests for like actions in the area." A number of lots in the area already exceed the 60% limit for impermeable surfaces. An increase in the impermeable

surface on appellant's lot 9 may in itself create very little deleterious effect on the ecology, but a number of lots in the area already exceed the 60% limit. We conclude that the increase of impermeable surface on appellant's property, the excesses already present, and further possible increases due to reliance on this decision as a precedent, raise a valid concern that the public may suffer substantial detrimental effect because of the possibility of ecological damage due to cumulative effect.

The Board concludes that a variance for an increase in the proportion of impermeable surface on lot 9 should be denied.

XVIII

The failure to meet any one of the criteria for approval of a variance permit is cause for denial. Our conclusion above makes it unnecessary to consider the other criteria of 7.28.020.

XIX

In summary, the Board has concluded that appellant's project will not increase the nonconformity of his dwelling and no variance is required for that reason. The Board has also concluded that an increase in impermeable surface on lot 9 does require a variance permit, and that such a variance permit should be denied because of the cumulative effect of similar increases. And, finally, the Board concludes that, if the appellant acts to assure that the impermeable

surface does not exceed its previous proportion, no variance permit is required.

XX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

THAT the denial of Variance Permit No. 90-52 because of an alleged increase to a nonconforming development is reversed; THAT the denial due to an increase in the proportion of impermeability surfaces is affirmed, and THAT, if appellant takes action to the County's satisfaction to assure that the project does not increase the proportion of impermeable surface on lot 9 over that which previously existed without the dining room, no variance permit is required

SO ORDERED this 2nd day of March, 1992.

SHORELINES HEARINGS BOARD

ANNETTE S. McGEE, Presiding

HAROLD S. ZIMMERMAN, Chairman

(See Separate Opinion)

JUDITH A. BENDOR, Member

NANCY BURNETT, Member

DAVE WOLFENBARGER, Member

JOHN H. BUCKWALTER
Administrative Law Judge

0022j

0123J

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

VERN GAMBRIELL, Appellant, v. MASON COUNTY and State of Washington DEPARTMENT OF ECOLOGY, Respondents.	SHB No. 91-26 SEPARATE OPINION

I concur in the other opinion in all respects except for Conclusion of Law VIII.

My colleagues unnecessarily resort to the dictionary when the law is clear. Additional, there is hypothsizing about possible alternative language for the Mason County Shoreline Master Program. Such comment is inadvisable, and is, in judicial terms, dicta.

I

The Shoreline Management Act, Chapt. 90.58 RCW, its implementing regulations, Chapt. 173-14 WAC, and the Mason County Shoreline Master Program ("MCSMP) provide definitions germane to this case.1/ In several instances the language is identical.

1/ The MCSMP has been adopted by the State and has thus become state regulation as well. For simplicity, however, in this opinion, the term "state regulation" will only apply to Chapt. 173-14 RCW.

The term "development" is defined in the Shoreline Management Act at RCW 90.58.030(3)(d) as:

> *(d) [...] a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals, bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level;*

"Nonconforming development" is defined in both the state regulations at WAC 173-14-055(1), and the MCSMP at 7.13.020 as:

> *...a shoreline use or structure which was lawfully constructed or established prior to the effective date of the Act or the Master Program, or amendments thereto, but which does not conform to present regulations or standards of the Program or policies of the Act.*

II

How a particular development is nonconforming depends upon whether it is inconsistent with a use (see WAC 173-14-150), or with a specific bulk, dimensional or performance standard (see WAC 173-14-140). In this instance the nonconformity, the over-water deck, is inconsistent with current bulk or dimensional requirements. It is not inconsistent with a use.

The state regulations at WAC 173-14-055(2) state:

> *Nonconforming development may be continued provided that it is not enlarged, intensified, increased, or altered in any way which increases its nonconformity;*

The MCSMP at 7.13.020 page 20 is the same, except for the added proviso about adverse environmental impacts.

Mason County contends that if more people use this existing lawful deck which is not going to be physically changed in any way, that such human activity somehow enlarges, intensifies, or increases the nonconformity. Given the above recited law, such contention simply has no basis. The increased human activity in no way increases the dimensional or bulk nonconformity.

There is no need to rely on a dictionary to reach this result. Such reliance gives the erroneous impression there is a gap in the law.

DONE this 2nd day of March, 1992.

JUDITH A. BENDOR, Attorney Member

SHB

94-2 to 94-72